COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

The Berkshire Gas Company	)))	D.T.E. 02-81

INITIAL BRIEF OF
THE BERKSHIRE GAS COMPANY

I. PROCEDURAL HISTORY

In accordance with G.L. c. 164, §94A, on November 27, 2002 The Berkshire Gas Company ("Berkshire" or the "Company") filed with the Department of Telecommunications and Energy (the "Department") its Petition for the Approval of a Gas Purchase Agreement between The Berkshire Gas Company and BP Energy Company (the "Petition"). The Petition sought approval of the Gas Purchase Agreement between Berkshire and BP Energy Company ("BP Energy") dated as of November 1, 2002 (the "Purchase Agreement"). The Company submitted the prepared testimony and schedules of Karen L. Zink, Vice President, in support of the Petition. Finally, the Company filed a Motion for Protective Treatment of Confidential Information for a portion of the Purchase Agreement as well as materials relating to the competitive solicitation that resulted in the execution of the Purchase Agreement.

Pursuant to its duly published notice, the Department conducted a public hearing at its offices on January 23, 2003. On January 13, 2003 the Attorney General of the Commonwealth (the "Attorney General") filed notice of intervention as of right pursuant to G.L. c. 12, §11E. The Department also allowed the petition of Boston Gas Company, Colonial Gas Company and Essex County Gas Company each doing business as KeySpan

Energy Delivery New England to participate in this proceeding as limited participants. The Department conducted a public and evidentiary hearing on January 23, 2003.

At the evidentiary hearing, the Company presented the testimony of Ms. Zink wherein she adopted the prepared testimony submitted with the Petition and addressed questions from the Department staff and the Attorney General. In addition to the sworn testimony accepted at the hearing, the evidentiary record consists of approximately 25 exhibits, including the Company's initial filing and supporting documentation, the Company's responses to the Information Requests of the Department staff and the Company's responses to the Information Requests of the Attorney General. This evidentiary record demonstrates that the Purchase Agreement is consistent with the public interest in that the BP Energy supply resource is consistent with the Company's portfolio objectives and compares favorably to the range of alternative options reasonably available to the Company and its customers.

The Hearing Officer required that Initial Briefs in this proceeding be filed by February 12, 2003 and that reply briefs be submitted by February 19, 2003. The Hearing Officer requested that the Company address issues with respect to reliability and diversity of supply in its brief. The Company's Initial Brief is submitted in accordance with the procedural schedule established by the Hearing Officer.

II. <u>DESCRIPTION OF THE PURCHASE AGREEMENT AND RELATED SOLICITATION PROCESS</u>

The Purchase Agreement provides for a firm gas supply with a maximum daily quantity ("MDQ") of 10,553 MMBtu per day during the winter months (November through March) after accounting for fuel losses and an MDQ during the summer months (April through October) of

5,276 MMBtu per day. Exh. B-1, p. 3; Exh. BG-2, pp. 2-3. The Purchase Agreement provides for a term commencing upon Department approval of the Purchase Agreement and expiring March 31, 2004.[1] The Purchase Agreement includes competitive pricing terms providing the Company with substantial flexibility in terms of pricing options. Exh. BG-2. The Company maintains long-haul transportation rights on the Tennessee Gas Pipeline Company ("Tennessee") system for delivery of such volumes to the Company's service area. The Purchase Agreement replaces certain domestic supply contracts that the Company maintained with Dynegy Marketing and Trade ("Dynegy") and Aquila Energy Marketing Company ("Aquila") that were originally executed in the 1990's.

Ms. Zink demonstrated that the Purchase Agreement is consistent with the portfolio objectives established in the Company's most recent Long Range Forecast and Supply Plan (the "Supply Plan") for the Berkshire service area as submitted to and recently approved by the Department in The Berkshire Gas Company, D.T.E. 02-17 and also compares favorably to the range of alternatives reasonably available to the Company and its customers. Exh. BG-1, pp. 8-9; Exh. DTE 1-4. In the Supply Plan, the Company explained that it had identified a need for a replacement resource to certain supply contracts with Dynegy and Aquila pursuant to which the Company has been receiving base load gas supplies since 1992 and 1993. The terms of the Dynegy and Aquila supply contracts expired either on June 1, 2002 or October 1, 2002. The Company's Supply Plan recognized that the Company would be completing a solicitation of bids from competitive suppliers seeking to secure a

[1] In order to facilitate the Department's review of the Purchase Agreement and to ensure continuing reliable service, the Company and BP Energy executed an Interim Agreement (Exh. BG-9) to cover the period prior to the completion of the Department's review.

replacement resource for the Dynegy and Aquila supply on terms most favorable to the Company and its customers. Exh. BG-1, p. 16.

Ms. Zink explained that the Company proposes to substitute the BP Energy supply resource for the expiring Dynegy and Aquila agreements. Berkshire, therefore, explained that the addition of the BP Energy supply represents a replacement resource, rather than a resource that is incremental to the existing portfolio. The Company demonstrated that the Purchase Agreement satisfies the Department's standard set forth in Commonwealth Gas Company, D.P.U. 94-174-A (1996) for the addition of a replacement resource contract. Exh. BG-1, p. 4.

III. STANDARD OF REVIEW

In evaluating a gas utility's resource options for the acquisition of commodity resources under Section 94A, the Department examines whether the acquisition of the resource is consistent with the public interest. Commonwealth Gas Company, D.P.U. 94-174-A at 27 (1996). In order to demonstrate that the proposed acquisition of a resource that provides commodity and/or incremental resources is consistent with the public interest, a company must show that the acquisition: (1) is consistent with the company's portfolio objectives; and (2) compares favorably to the range of alternative options reasonably available to the company and its customers, including releasing capacity to customers migrating to transportation, at the time of the acquisition or contract renegotiations. Id.

In establishing that a resource is consistent with a company's portfolio objectives, the company may refer to portfolio objectives established in a recently approved resource plan or in a recent review of supply contracts under G.L. c. 164, §94A, or may describe its objectives in the filing accompanying the proposed resource. Id. In comparing the proposed resource acquisition to current market offerings, the Department examines relevant price and non-price attributes of each contract to ensure a contribution to the strength of the overall supply portfolio. Id. at 28. As part of the review of relevant price and non-price attributes, the Department considers whether the pricing terms are competitive with those for the broad range of capacity, storage, and commodity options that were available to the company at the time of the acquisition, as well as with those opportunities that were available to other companies in the region. Id. In addition, the Department determines whether the acquisition satisfies the LDCs' non-price objectives, including, but not limited to, flexibility of nominations and reliability and diversity of supplies. Id. at 29.

IV. ANALYSIS

A. The RFP Process

In early 2002, Berkshire recognized the need to develop and implement a process for securing adequate replacement resources and to identify and implement the necessary actions for securing a competitive replacement gas supply upon the termination of the Dynegy and Aquila contracts. On April 19, 2002, the Company issued a Request for Proposal for Firm Gas Supply Service ("RFP") seeking proposals for a replacement supply source. The RFP sought "flexible pricing alternatives including fixed price proposals for the full replacement requirement." Exh. BG-1, p. 4. Bids were to be evaluated based upon price and non-price terms. Id. The RFP identified an overall need of no more than 10,553 MMBtu/day for the winter period and approximately 50% of this requirement for the summer period, although Berkshire was willing to consider alternative MDQ options. The RFP sought firm commitments commencing November 1, 2002 for a minimum term of one year and a maximum term of two years. Exh. BG-4, p. 6. The RFP described several potential pricing alternatives and noted that the Company would consider alternative pricing options. Exh. BG-4, p. 4. The RFP noted that the Company was not obligated to enter into any replacement supply contract. Exh. BG-4, pp. 12-13.

Berkshire included several specific requirements within the RFP to address issues of particular importance. For example, specific gas supply and delivery flexibility requirements were established. In addition, certain "bidder" qualifications were established, including specific operational requirements such as nomination flexibility and back-up availability. Exh. BG-1, pp. 5-6. Bidders were also made aware that Berkshire required substantial information relating to their financial strength. Id. at 6.

The RFP was issued to a number of suppliers covering a wide portion of the market.[2] The Company then conducted an in-depth evaluation of the four bids that were received in response to the initial RFP. Berkshire first analyzed bids for completeness. Exh. BG-1, p. 6. Next, the more substantive evaluation of the bids included an analysis of both price and non-price terms including security of supply, bid flexibility and the viability of the prospective supplier. Exh. BG-1, p. 6. The Company first analyzed the Duke Energy Trading and Marketing, L.L.C. ("Duke") proposal in terms of pricing. The Company noted that the Duke proposal was based upon "market area pricing" that the Company determined to be too "risky" in today's market due to the substantial price volatility associated with such a scheme. Id. at 6; Exh. DTE 1-5. Further, the demand charge proposed by Duke was higher than the

[2] The RFP was issued to Adams Resources Marketing, Ltd., Amerada Hess Corporation, Anadarko Energy Services Company, Aquila, BP Energy, Coral Energy Resources, L.P., Duke Energy Trading and Marketing, LLC, Dynegy, Exxon Mobil Gas Marketing Co., Mirant Americas Energy Marketing, L.P. and Texaco Natural Gas. Exh. BG-4; Exh. BG-5.

terms contained in the other three proposals. Accordingly, the Company rejected the Duke proposal. Exh. BG-8; Exh. DTE 1-5.

Berkshire recognized that the remaining three proposals "reflected comparable pricing terms" that were generally attractive and consistent with the Company's portfolio objectives. Id. The Company therefore recognized that the non-price factors contained within the RFP would be "determinative" factors in evaluating the remaining bids. In terms of the Mirant Americas Energy Marketing, L.P. proposal, the Company was aware of Mirant's increasing credit quality concerns. Exh. BG-1, pp. 6-7. In addition, the Company was aware that Mirant was withdrawing from a number of its business lines. Id. at 6. Berkshire did not wish to be substantially dependent upon a supplier with credit status concerns or that might not be able or willing to perform over the entire term of a potential contract. The Company next evaluated Anadarko Energy Services Company's proposal in terms of non-price factors such as reliability and flexibility. Berkshire was concerned that Anadarko's proposal reflected limited delivery points which, in fact, was confirmed in a separate, follow-up telephone conversation. Specifically, Berkshire was concerned with the fact that Anadarko does not maintain production capability on the Tennessee 800 leg and, therefore, its proposal did not provide for deliveries at that receipt point.[3] Berkshire recognized that such limitation was most likely not material in a normal or warmer than normal winter, but could be a substantial reliability concern during a design winter or cold snap when, for example, freeze-offs of wells became a practical concern. Tr. 29; Exh. DTE 1-5. In addition, Anadarko was not willing to commit to a contractual obligation whereby the freeze-off of wells would be excluded from the

[3] Ms. Zink explained that the 800 leg of the Tennessee system is where approximately 21% of the Company's supply is delivered. Exh. AG-1-2; Tr. 24. The inability to accept deliveries on this leg might result in substantially greater reliability risks.

definition of a force majeure event. This inferior service commitment in terms of reliability was an important consideration given actual Company experience. Exh. DTE 1-5; Tr. 29-30.

BP Energy's proposal, on the other hand, addressed all of the Company's non-price concerns. Thus, as Ms. Zink explained, the Company will receive "more from BP [Energy] for essentially the same cost." Tr. 20. Berkshire recognized that BP Energy was the largest producer and reserve holder in North America and maintains substantial resources on all three legs of the Tennessee system. Exh. BG-1, pp. 9-10. Berkshire also recognized that BP Energy maintained a favorable credit rating at the time of its solicitation, including a *Standard and Poors* rating of AA+. Exh. BG-1, p. 10. Berkshire also considered BP Energy's substantial references and its own direct experience with BP Energy in the course of an optimization alliance with BP Energy and certain affiliated companies reviewed by the Department in The Berkshire Gas Company, D.T.E. 01-41 (2001) and The Berkshire Gas Company, D.T.E. 02-19 (2002). Ms. Zink testified that BP Energy has, at all times, provided reliable service within the alliance and Berkshire was not aware of any circumstance where BP defaulted upon its contractual obligations with respect to gas supply. Exh. BG-1, p. 10, Tr. 19; Exh. DTE 1-7. As described by Ms. Zink, the Company might have preferred that an alternative supplier had provided a comparable bid so that the Company could have employed diverse suppliers to secure some measure of reliability. Exh. DTE 1-3. BP Energy nevertheless provided an opportunity for significant diversity benefits by reason of its substantial production resources that were available for delivery on all legs of the Tennessee system. Id. Simply put, BP Energy offered the best price, reliability and diversity benefits, superior credit quality and substantial resources on the TGP system.

In sum, the Company demonstrated that the RFP process was fair, open and transparent. The bidding and evaluation processes were clearly described to each bidder. Exh. BG-6. The Company implemented a well-structured solicitation that secured a wide range of bidders and secured a substantial response.[4] Potential bidders were able to seek clarification on the evaluation criteria and the RFP process. Bids were evaluated and the winning proposal selected based upon appropriate criteria that included price and non-price considerations. No bidder objected to the process or asserted that it was fairly excluded from consideration or that its bid was unfairly evaluated. In sum, Berkshire demonstrated that the Purchase Agreement compared favorably to the options available for the Company and its customers as well as other regional utilities. Accordingly, the Department should find that the RFP process was open, fair and transparent and approve the RFP process as appropriately conducted.

B. Reliability of Supply

As noted, the Hearing Officer requested that the Company address the diversity of supply within its brief. The Company notes that the Department's decision in Commonwealth Gas, D.P.U. 94-174-A addresses this concern in several aspects. First, the Department describes one of the fundamental aspects of its standard of review with respect to resource procurement, namely the "reasonably available" standard. Namely, a gas company should assess the opportunities that are "reasonably available to it." Id. at 27. The Department notes that this standard "should not be used as a justification for a narrowly defined and limited market examination." Id. Here, consistent with the Department's objectives,

[4] The Company has in the past sought to secure gas resources through a consortium. See Tr. 22; Exh. DTE-1-1; The Berkshire Gas, D.T.E. 02-56 (2003). The Company explored this concept as a means of reducing costs but found no such opportunities available at the time the Company needed to test the market. Tr. 22.

Berkshire pursued a wide solicitation of potential bidders and conducted a robust examination of the bids received.

In Commonwealth Gas, the Department also noted that it will evaluate a new gas resource to determine "whether the acquisition satisfied [the Company's] non-price objectives including, but not limited to, flexibility of nominations, and reliability and diversity of supplies". Id. at 29. Ms. Zink explained how the BP Energy contract contributed substantially to "reliability and diversity of supplies." The BP Energy resource was backed up by an experienced entity, with superior credit quality and substantial and diverse productive resources. Exh. DTE 1-4; Exh. DTE 1-5. These resources were located strategically on the system of the Company's interstate transporter. In sum, the BP Energy resource provided not only the most attractive cost but the greatest opportunity for reliable service through the application of diverse resources. The arbitrary requirement that the Company's base load supplies somehow be secured from more than one supplier would, in this instance, frustrate a point "stressed" by the Department with respect to resource planning. Namely, "the price and non-price attributes of each commodity contract should contribute to the strength of the overall supply portfolio." Commonwealth Gas, D.P.U. 94-174-A, p. 28. The BP Energy resource advances the fundamental goal of enhanced reliability while a mechanical application of forced diversity would, in this case, frustrate this objective.[5]

[5] Ms. Zink also explained the fact that the Company's extremely flexible resource portfolio would facilitate Berkshire's ability to maintain reliable service in the "extremely doubtful" circumstance where BP Energy was not able to meet its contractual obligations. Tr. 24-25. For example, Berkshire maintains a contractual relationship with a local cogeneration facility that can provide in excess of 30,000 decatherms a day for the Company's use. Id. at 41. In addition, a new liquefied natural gas ("LNG") plant and the Company's peak service resources such as L.P. as well as storage resources could contribute to the ability to provide reliable service. Id. at 41-42. In The Berkshire Gas Company, D.T.E. 02-17, p. 44 (2003), the Department found that "the Company [has] built sufficient flexibility into its resource portfolio to meet any contingencies," including interruption of LNG supply.

C. Purchase Agreement

Berkshire demonstrated that the Purchase Agreement is in the public interest because it contributes to a least-cost resource portfolio consistent with Berkshire's portfolio objectives. First, Berkshire demonstrated that securing a replacement source of supply for the expiring Dynegy and Aquila contracts would enable the Company to continue to provide cost and reliability benefits to its customers through the Company's primary domestic pipeline base load supply. Berkshire's most recent Supply Plan submitted to the Department in docket D.T.E. 02-17 reflected the continuing contribution of domestic base load, pipeline supplies to the Company's resource portfolio. Exh. BG-1, p. 9; Exh. DTE 1-4. The BP Energy supply contributes to the Company's ability to satisfy its various planning standards. The Company included representative volumes in the various dispatch model "runs" submitted with the Supply Plan and described its ongoing efforts to secure the BP Energy supply. Exh. BG-1, p. 9. Finally, Berkshire explained that the term of the Gas Purchase Agreement is consistent with the transition period identified by the Department in D.T.E. 98-32. Id. Accordingly, the Department should find that the Purchase Agreement contributes to a least-cost portfolio consistent with the Company's portfolio objectives.

V. CONCLUSION

Berkshire has demonstrated that the execution of the Purchase Agreement is consistent with the public interest in that the BP Energy supply resource is consistent with Berkshire's portfolio objectives and compares favorably to the range of alternative options reasonably available to the Company and its customers. Accordingly, the Department should approve the Purchase Agreement and take such other action as may be necessary and appropriate.

Respectfully submitted,

THE BERKSHIRE GAS COMPANY

By its attorneys,

____

James M. Avery, Esq.
Brown Rudnick Berlack Israels LLP
One Financial Center
Boston, Massachusetts 02111
Tel: (617) 856-8112
Fax: (617) 856-8201

Dated: February 12, 2003